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Supreme Court, U.S.
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70-104

In the Supreme Court of the United States

OCTOBER TERM, 1970

EDDIE JAVOR, ALAN H. RICE and
LAWRENCE S. TOROKER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The first opinion of the court of appeals is reported at 403 F. 2d 507 (Pet. App. B). The second opinion of the court of appeals is reported at 435 F. 2d 836 (Pet. App. A).

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1970, and a petition for rehearing

was denied on January 25, 1971. The petition for a writ of certiorari was not filed until March 26, 1971, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *voir dire* evidence, presented out of the jury's hearing, supports the trial judge's finding that the confessions made by petitioners Rice and Toroker were voluntary.

2. Whether it was error to permit the confessions, which implicated petitioner Javor, to be introduced under limiting instructions on cross-examination of Rice and Toroker, who had exculpated Javor on direct examination.

3. Whether the court of appeals erred in declining to apply its subsequent decision in *Wade* v. *United States*, 426 F. 2d 64 (C.A. 9), to the instructions on the insanity defense given in this case.

STATEMENT

In a thirteen count indictment returned in the United States District Court for the Southern District of California, petitioners were charged with receipt, concealment and sale of various quantities of heroin, cocaine, and marijuana, in violation of 21 U.S.C. 174 and 176(a).[1] After a jury trial, each

[1] Rice was charged in all thirteen counts, but two were dismissed prior to trial. Toroker was charged in nine counts and Javor was charged in two. A fourth defendant, Michael DeCristo, was charged in four counts of the indictment, but

was found guilty as to all counts in which he was charged. On December 17, 1965, Javor was sentenced to concurrent terms of seven years' imprisonment. On May 16, 1966, after having been committed for study pursuant to 18 U.S.C. 4208(b) and (c), Rice and Toroker were each sentenced to concurrent terms of five years' imprisonment. On appeal, the court of appeals remanded the case for further proceedings to determine the voluntariness of confessions given by Rice and Toroker. 403 F. 2d 507. The district court then stated that the court of appeals had misread its initial ruling on the issue, and that it had indeed concluded beyond a reasonable doubt that the confessions were voluntary. (II R. 53).[2] The court of appeals thereupon affirmed the convictions. 435 F. 2d 836.

1. The evidence showed that on May 18, 1965, Federal narcotics Agent Richard Salmi, acting in an undercover capacity, went to the residence of petitioners Rice and Toroker and asked if he could obtain an ounce of heroin.[3] Toroker told him that he was

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failed to appear for trial. He was subsequently apprehended and pleaded guilty to two counts, the remaining two having been dismissed. On January 3, 1966, he was sentenced to concurrent terms of five years' imprisonment.

[2] "R", preceded by a Roman numeral, refers to the three-volume Record of Proceedings in the Court of Appeals, filed with the Clerk of this Court.

[3] Despite prolonged and repeated efforts, we have been unable to obtain a copy of the transcript of trial proceedings in the instant case. Accordingly, we have culled the facts from the Brief for Appellee, filed on petitioners' initial

expecting delivery of an ounce shortly, and that the price would be $500. Salmi agreed to contact Toroker at a later date. The following day, Toroker asked Salmi if he would be interested in buying cocaine, stating that he had access to quantities of the drug. Toroker said the sale of narcotics and LSD was their sole source of income.

On May 21, Salmi returned to the residence, and in the presence of DeCristo, purchased one ounce of heroin from Toroker for $500. Two days later, Toroker offered Salmi cocaine at $1,000 per ounce and five ounces of heroin, instructing Salmi to contact Rice. On May 24, Salmi called Rice, who told the agent that he had a package of cocaine and "the other." The following day Salmi, accompanied by another narcotics agent, Sherman, went to Rice's residence where they were joined by DeCristo. The agents bought 85.360 grams of heroin for $1,090. The next day, Sherman returned for the sample and was shown three condoms containing a white powder which Rice identified as cocaine. Sherman received a .350 gram sample of the powder and left.

The agents met again with Rice and Toroker on June 2, 1965. At this meeting, they were shown a price list for heroin. On this occasion, Toroker offered, and the agents accepted, several marijuana cigarettes. On June 5, Rice notified Salmi that his "source of supply" would deliver a sample of heroin that night. Salmi arrived that evening. He noticed

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appeal; the two opinions of the court below; and the "Hearing Memorandum" filed by petitioners Rice and Toroker for the hearing on remand in the district court. (I R. 8-12).

that petitioner Javor's car was parked in the carport of the house. He entered the home and, a short while later, heard Javor's car drive away. Soon thereafter, Rice and Toroker gave Salmi samples of both European and Mexican heroin.

On June 7, both Salmi and Sherman returned and were given ten ounces of heroin by Rice and Toroker. Rice then asked for $7,500 in payment. At this point, the two were arrested. With the permission of Rice, the agents later monitored a call from his "source of supply" who identified himself as "Eddie." "Eddie" agreed to meet Rice that evening to pick up the money Rice had supposedly collected from the agents, and to discuss the delivery of the balance of the heroin order. The same evening, Javor drove to the residence and was arrested.

2. At trial, both Rice and Toroker took the stand and denied that Javor was their supplier. The government, in an effort to discredit their testimony, sought to introduce their written confessions, made shortly after their arrest. Rice and Toroker objected on the ground that the confessions were involuntary since they had both been under the influence of LSD. The trial judge thereupon excused the jury in order to hear evidence on the issue.

The government introduced Federal Narcotics Agent Voll, who had taken the confessions. He testified that before Rice confessed, the agent had asked him if he used any narcotic or was an addict. Rice replied that he did not, but that he occasionally smoked marijuana and used LSD. Asked if he was then under the influence of either, Rice answered

that he was not. Toroker also denied being an addict, although, like Rice, he admitted using marijuana and LSD occasionally. Toroker also denied being then under the influence of either marijuana or LSD. The agent testified that both appeared normal. The defense introduced the reports of two psychiatrists, Tweed and Von Hagen, who had examined both Rice and Toroker. On Rice, Tweed's report revealed that Rice had told the doctor that he had been using LSD since 1959 and that, on the day of the offense and confession, he was under the influence of LSD. Toroker told the doctor that he had been using LSD for the past several years and, on that day, had taken a 500 microgram dose. He said that he had used the drug extensively in the weeks prior to his arrest and was under the influence of LSD when he confessed. From these admissions, Dr. Tweed concluded that the two were suffering from a schizophrenic-like reaction induced by LSD consumption and were insane at the time of commission of the offense (hence, the defense argued, at the time of confessing shortly thereafter). No other evidence was presented. The trial judge found the confessions to be voluntary and permitted their admission (435 F. 2d 836; II R. 53).

ARGUMENT

1. While petitioners Rice and Toroker now contend that the trial judge should have held a "sanity hearing" concerning their state of mind at the time

they confessed,[4] they present no evidence which the court should have considered in addition to that already before it. Indeed, this issue was before the court when it heard the evidence and determined the confessions were voluntary and that Rice and Toroker were sane at the time. The court had before it the reports of two psychiatrists, both of whom were dealing with the question petitioners now raise and one of whom, Dr. Tweed, had interviewed them at their own request. The doctors' conclusions were necessarily premised upon the self-serving admissions of Rice and Toroker that they were under the influence of LSD at the time they confessed. Yet the two had denied this fact when asked by Agent Voll. This presented a basic, evidentiary conflict which the trial judge could rightfully resolve against petitioners.

The reports further indicated—and this was later corroborated by the testimony of petitioners (see II R. 51)—that usage of LSD manifests itself in bizarre or irrational behavior. But the evidence of the crime,

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[4] Petitioners additionally argue that the jury was deprived of pertinent evidence of the issue of voluntariness by the court's decision to limit evidence of their usage of LSD generally. That fact was, however, already in evidence. The receipt of cumulative evidence on the subject was within the sound discretion of the trial judge. *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150; *Loux* v. *United States*, 389 F. 2d 911 (C.A. 9), certiorari denied, 393 U.S. 867; *Fabian* v. *United States*, 358 F. 2d 187 (C.A. 8), certiorari denied, 385 U.S. 821. Since the proposed testimony bore only tangentially on petitioners' state of mind at the time of the confessions, the trial judge acted well within his discretion.

which had already been heard at the time of the hearing, indicates that, in the month preceding their arrest, both petitioners exhibited rational attitudes in the conduct of a major narcotics enterprise. In a period when the two had told the psychiatrists they were using LSD in substantial quantity, they were able to carry on their trafficking in narcotics in a very businesslike manner, to the point of offering a price list and heroin samples to the agents in order to induce future sales. Moreover, Agent Voll testified that the two appeared normal, a statement which does not, contrary to petitioner's assertions, require expert opinion.

The sole evidence of insanity was the psychiatric reports showing that, if Rice and Toroker were laboring under the influence of LSD, as they asserted, then they would have been insane at the time. In light of the other evidence which the judge had before him, he could reliably have concluded that petitioners were sane and that the confessions, therefore, were voluntary.[5]

2. Counsel for petitioners stipulated before the jury that Rice and Toroker had previously admitted committing the offenses charged. Although the confessions identified Javor as the source of the narcotics, the government made no reference to this in presenting its case-in-chief. During the presentation of the defense, both Rice and Toroker testified that

[5] Petitioners assume that the appropriate standard for the trial judge would be to find the confession voluntary "beyond a reasonable doubt." The trial judge made this determination (II R. 53).

one "Nick" was their supplier, not Javor, and that Javor had been present at their residence during the relevant period to transact other business. Upon cross-examination, the trial judge permitted the government to impeach this testimony by confronting both with portions of their confessions which implicated Javor. The court then carefully instructed the jury to consider the confessions only for purposes of impeachment and not as evidence against Javor.[6] 403 F. 2d at 512.

The introduction of the confessions under these circumstances did not, as petitioner Javor contends, violate the rule of *Bruton* v. *United States*, 391 U.S. 123. Each confessing co-defendant was available for redirected-examination by Javor, thus preserving the right of confrontation. *Nelson* v. *O'Neil*, No. 336, this Term, decided, June 1, 1971; *United States* v. *Ballentine*, 410 F. 2d 375 (C.A. 2), certiorari denied, 397 U.S. 928; *United States* v. *Boone*, 401 F. 2d 659 (C.A. 3), certiorari denied *sub nom. Jackson* v. *United States*, 394 U.S. 933. The fact that both confessors testified that the confessions were untrue did not affect their admissibility, but merely presented a question of credibility for the jury to resolve.[7] *United States* v. *Sims*, 430 F. 2d 1089 (C.A.

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[6] Under *California* v. *Green*, 399 U.S. 149, petitioner thus received more than was required constitutionally. *Green* makes clear that, within constitutional limits, the confessions could be considered as substantive proof of Javor's involvement.

[7] Petitioner suggests (Pet. 13-14) that the decision below is in conflict with those of other courts of appeal, particularly

6); *United States* v. *Ballentine, supra.* The jury had a right to know that Rice and Toroker, who were testifying for Javor, had made contrary statements. See *Harris* v. *New York,* No. 206, this Term, decided February 24, 1971.

3. Petitioners requested the instructions on insanity given by the court. In its first opinion, the court of appeals rejected petitioner's claim that these instructions were nonetheless erroneous, noting only that the insanity defense did not "merit discussion." 403 F. 2d at 508. While the present case was on remand, the court of appeals decided *Wade* v. *United States,* 426 F. 2d 64 (C.A. 9), which ruled that instructions on insanity similar to those given at petitioner's trial would no longer be considered sufficient. The court said that the rule announced in *Wade* was to have "limited retroactivity" to those cases where the conviction had not become final on the date of decision (426 F. 2d at 74). In its decision affirming petitioners' conviction, the court of appeals declined to apply *Wade.* It ruled that the judgments of con-

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United States v. *Guajardo-Melendez,* 401 F. 2d 35 (C.A. 7). In that case, a narcotics agent testified that a co-defendant had admitted to him that the appellant was his partner. Although the co-defendant later took the stand, the court expressed doubt as to whether he could properly have been cross-examined on the statement. 401 F. 2d at 38, n. 5. The court, in *Guajardo-Melendez,* did not purport to deal with the issue presented in the instant petition, whether such statements could have been admitted to impeach the co-defendant, but rather held that they had been improperly admitted as evidence of the truth contained therein, despite the trial court's instructions to the contrary.

viction had been final as to every issue—including that of the insanity instruction—which had been presented, except for the voluntariness of the confessions (435 F. 2d at 837).

The issue presented by the instruction was wholly independent from those concerning the confessions, and the resolution of the former in no way affected the disposition of the latter. In light of the insubstantiality of the defense of insanity in this case, and the fact that petitioners affirmatively requested the instructions given, the ruling of the court of appeals was appropriate.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1971.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 428806 730